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Federal Communications Commission
Office of the Secretary

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GC 10-43

February 25, 2010

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

ORIGINAL

Re: Ex Parte Communication, 47 C.F.R. § 1.1206
WT Docket No. 08-165, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 09-153, MB Docket No. 09-13; FCC 10-31

Dear Ms. Dortch:

On February 25, 2010, Ken Fellman, the President of NATOA, Joanne Hovis, the President-Elect of NATOA, Gerry Lederer of Miller & Van Eaton, P.L.L.C., and I met with Commissioner Robert McDowell of the Federal Communications Commission along with his Policy Director and Wireline Counsel Christine Kurth. The purpose of the meeting was to discuss local management of rights-of-way and the treatment of public rights-of-way in the National Broadband Plan (GN Docket Nos. 09-47, 09-51, 09-137) and the Level 3 Proceeding (WC Docket No. 09-153).

We also briefly discussed NATOA's pending Petition for Reconsideration on the Commission's recent Wireless Facilities Siting Order (FCC 09-99, WT Docket No. 08-165). We also urged action on the PEG Petitions that remain pending before the Commission (MB Docket No. 09-13). Finally, we briefly discussed the Commission's investigation into amending the ex parte rules (FCC 10-31).

The specifics of the conversation followed the attached documents.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceedings noted above.

Sincerely,
/s/ Matthew R. Johnson
Matthew R. Johnson
Legal Fellow
NATOA

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List A B C D E

cc: Christine Kurth, Policy Director & Wireline Counsel, Office of Commissioner McDowell

FCC ACTION COULD THREATEN LOCAL JOBS WITHOUT ANY GUARANTEE OF CONSUMER BENEFITS

INTRODUCTION

Many communications companies must place poles, wires and boxes on public property (including streets and rights-of-way) in order to reach customers. This property is very valuable, and Congress in the Communications Act recognized that the public's property need not be given away to private companies. Congress preserved local authority to require these companies to pay a fair rent for its use, just as other businesses pay rents for the properties they use.

- The FCC, as part of the National Broadband Plan (NBP), is being urged to establish a national standard for compensation for public property that requires states and localities to prove that fees are related to costs.
- This could immediately scorch municipal and state budgets (since providers would not pay those existing fees, and communities could not be certain what fees could be collected), and trigger a new wave of lay-offs and cuts in public services.
- There is no guarantee that any of the funds denied local government will result in any consumer benefits in the form of either increased broadband deployment or reduced prices.
- The reduction of funding will likely *reduce* broadband availability because local governments will have fewer funds to use to provide broadband to community institutions.

ACTION WILL HAVE A DRAMATIC AND HARMFUL IMPACT.

Declaring current fees unlawful, or calling their validity into question would result in hundreds of millions, if not billions, in revenue lost to local budgets. This is particularly true if, as some companies have suggested in the past, fees are federally-limited to recovery of out-of-pocket costs, and companies cannot be charged the fair market value of the public property that they use for private profit. Such a limitation would result in immediate and long-term transfer of public wealth to private communications companies, and losses in local revenues. These losses could lead to:

- Cuts in essential services such as public safety, housing, job placement and childcare at the very moment they are most needed.
- Layoffs of police, firefighters, and teachers, the same jobs the Obama Administration has worked so hard in the Recovery Act to preserve.
- Deepening of the recession experienced in these communities.

THERE IS NO GUARANTEE OF CONSUMER BENEFIT.

Federally limiting fees charged for use of public property to cost recovery will do nothing to increase broadband deployment and could undercut funding currently used by local governments to expand broadband to the most vulnerable of society.

- It is unlikely that the FCC will require providers to pass savings on to consumers or invest the savings from this government subsidy on more broadband deployment. History shows that they will not do so.

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THERE ARE STEPS THE FCC CAN AND SHOULD TAKE.

There are steps that the FCC can and should take to enhance the availability of affordable broadband services. The FCC could start by acknowledging local governments' long-recognized property rights, and affirming what Congress declared: the FCC has no business deciding how states and localities price public property. In fact, the FCC should make it clear that local and state governments can encourage broadband deployment by giving preferential rates to companies that agree, for example, to build-out underserved areas. The FCC should also:

- Convene forums for the sharing and developing of best practices in rights-of-way management to facilitate broadband deployment. Specifically, a Task Force composed of local and state government officials responsible for managing and pricing public property could be developed to work with the FCC and NTIA to develop such best practices.
- Protect and encourage broadband deployment by encouraging localities to leverage their resources (including their own broadband facilities) to increase competition.

THE UNITED STATES CONFERENCE OF MAYORS

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January 27, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Mignon Clyburn
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Meredith Attwell Baker
Commissioner
Federal Communications Commission
445 12th Street , SW
Washington, DC 20554

Dear Commissioners:

As the Federal Communications Commission enters final deliberations on a National Broadband Plan, we write to urge you to reject proposals that would limit local authority to manage local rights-of-way and/or would negatively impact local budgets.

Congress recognized the importance of local control in Section 253 of the Communications Act. Moreover, any local government revenue loss in these difficult economic times could very well result in additional cutbacks of critical city services. The ongoing recession has had a devastating impact on city budgets. Cities of all sizes in all parts of the nation have been forced to institute layoffs, furloughs, service reductions, and fee increases. The next fiscal year looks even worse for cities, with more than four in five cities anticipating a budget shortfall. The nation's mayors do not believe Congress or the Obama Administration intended for the National Broadband Plan to be used as a vehicle to take revenue from city budgets in order to subsidize private entities.

Cities and their metropolitan areas are where 84 percent of our people live and more than 90 percent of future economic growth will occur. Mayors understand the role that broadband can play in enhancing educational opportunities, promoting economic development, improving health care delivery, assisting in achieving energy efficiency goals, and quite simply, determining if our cities can compete in the world economy. We also believe that rights-of-way management has served to promote, not retard, universal access to broadband services, while at the same time, protecting public health and safety, and keeping rights-of-way accessible for safe transportation.

The United States Conference of Mayors has been an active participant in the effort to develop a National Broadband Plan. And, we look forward to continuing to work with the Commission as you enter final deliberations and before the National Broadband Plan is forwarded to Congress. We appreciate the robust and open manner in which you have conducted the process for crafting the National Broadband Plan. Please feel free to contact Tom Cochran or Ron Thaniel of the Conference staff at 202-861-6711 if you have any questions.

Sincerely,

Elizabeth B. Kautz
Mayor of Burnsville
President

Tom Cochran
CEO and Executive Director

Cc: David Agnew

30 Day Review for Completeness Deadline Will Delay Deployment

- **On December 17, 2009, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the United States Conference of Mayors, and the American Planning Association submitted a Petition for Reconsideration or Clarification on the narrow issue of the Commission's authority to impose a 30 day deadline for tolling the "shot clock" for facial incompleteness.**

- **The issue was included in the FCC's Declaratory Ruling imposing a shot clock on wireless facilities siting application review (WC Docket No. 08-165).The basis for our petition was that the 30-day rule does not reflect the realities of the tower siting review process. Often times, issues that would merit the tolling of a deadline for actions (shot clock) do not arise until after 30 days from filing.**

- **Responses from local governments in support of our Petition offer real world examples such as historic preservation requirements, architectural approval and authorization I by 3rd parties not always affiliated with the local government. Examples include:**

    - Philadelphia, Pennsylvania pointed out that each application requires reviews by various departments, including compliance with historic preservation requirements. Thus, it is not always possible to determine if an application is complete within 30 days.

    - Portland, Oregon pointed out that in cases of sites with significant architectural features, the review process may require additional information (that was not apparent when the application was filed) that take time. The need for such additional information often cannot be determined within 30 days of the application being filed.

    - Greater Metro Telecommunications Consortium in Colorado pointed out that many ordinances have specific public notice requirements before a zoning board can review an application. If an applicant failed to follow the requirements of the local ordinance, the oversight would likely not be caught in the first 30 days, but would require, according to state law, a postponement of the hearing until the state law notice requirements are met.

    - Livonia, Michigan's laws require review by staff and then a second review at a public hearing. Due to the need for publication of these hearings it often occurs after 30 days. Under the 30-day deadline, as proposed in the Order, the second review, this one by the public, would not be possible or could take place with no ability to address the public's concerns.

- **Opposition argued that providing for tolling beyond 30 days and for reasons beyond facial completeness was unnecessary because the Ruling allows the applicant and the local government to toll the shot clock by "mutual consent."**

    - This "alternative" leaves local governments (many facing dire economic situations right now) at the mercy of applicants. They must hope that applicants act in good faith.

    - Applicants will be free to use the threat of litigation if an application is denied or is not approved within 90 (or 150) days even if the applicant or a 3rd Party is at fault for the delay.

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- Local governments are not in a position to chance litigation expenses and bad faith applicants could use the 30-day rule to their advantage by delaying responses to legitimate requests for information made after the first 30 days.

- **The end result of the 30-day rule could be a dramatic increase in the number of applications denied because they are incomplete, rather than the parties seeking common ground on extensions as local government will not chance litigation. Applicants will be forced to file new applications (and pay additional fees) every time a mistake is found after 30 days unless the applicant is willing to consent to tolling the shot clock. Ironically, this rule will slow down the deployment of the wireless facilities it hopes to expedite.**

The FCC Should Grant the Pending PEG Petitions to Protect Community Media

Public Educational and Governmental ("PEG") channels serve the public interest by uniquely meeting the needs of communities. The FCC should grant the pending PEG petitions: CSR-8126, CSR-8127, and CSR 8128 in MB Docket No. 09-13 as a means to protect communities and consumers' interest.

PEG channels make local governments more transparent, provide educational tools after school, serve as a conduit for emergency communications, and add to the marketplace of ideas by ensuring community access.

- There is no "one-size-fits-all" model for public access channel programming.
- PEG Channels are local and non-commercial. Local PEG channels serve the public interest by providing local and diverse noncommercial video content.
- PEG channels foster transparency in local government by cable-casting public meetings and events. In addition, they provide information about vital government services, such as voter registration, public health and low-income assistance.
- PEG channels promote important initiatives and public services, such as fitness programs for seniors, healthy food and nutrition tips for low income families, as well as after school homework helper programs and information about free parks and recreation programs.
- PEG channels are used to distribute disaster preparation programming, to provide real-time information on evacuations, road closures and service outages during an emergency, and to publicize recovery efforts to inform victims about assistance centers and relief services after the fact.
- PEG channels, and particularly public access channels, play a unique role in many cities, as an "electronic soapbox" to encourage the expression of a wide range of local viewpoints.

Discriminatory placement of local PEG channels on inferior channel tiers or video streams will frustrate the public interest by restricting access to the valuable and beneficial content available only on PEG

- Slamming local PEG channels to high-numbered tiers or relegating them to a Channel 99 maze of menus will make the channels difficult for viewers to find.
    - Unlike the commercial channels, PEG operators have virtually no resources to market the channels or channel locations, and are unable to benefit from national or regional branding campaigns to help direct viewers to the channel numbers.
    - PEG channels operators rely on "channel surfing" for viewers to discover the content on these channels, and for channel number recognition to allow viewers to locate the information required easily and quickly.
- In the case of AT&T's channel 99, the process of finding the PEG channels is physically cumbersome, time consuming and frustrating for the viewer.
    - Channels relegated to this tier lack the basic functionality expected with today's video services. For example, they cannot be recorded on a DVR, nor can they be located on an interactive program guide, nor can the viewer toggle back and forth from a PEG channel back to a commercial channel.
    - The inability to provide closed captioning and secondary audio channels frustrates viewers with special needs.

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